

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CALENCE, LLC,)	
)	CASE NO. C06-0262RSM
Plaintiff,)	
)	ORDER GRANTING IN PART
v.)	CORPORATE DEFENDANTS'
)	MOTION FOR SUMMARY
DIMENSION DATA HOLDINGS, <i>et al.</i> ,)	JUDGMENT AND DENYING
)	PLAINTIFF'S MOTION FOR
Defendants.)	SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on corporate defendants' Motion for Summary Judgment and plaintiff's related Motion for Partial Summary Judgment. (Dkts. #193 and #214). Corporate defendants argue that there is no evidence supporting a tortious interference claim against them; there is no evidence that any employee actually possessed any trade secrets, and even if they did, there is no evidence that any trade secrets were used by any of the employees; plaintiff's unfair competition act must fail because the legitimate hiring of employees does not constitute an unfair act, and the act of hiring several of Calence's employees was not an act occurring in the public interest; plaintiff's civil conspiracy must fail because there is no evidence of any unlawful or dishonest undertaking; plaintiff's claims for conversion or replevin must be dismissed because Calence cannot establish ownership of the disputed materials; and there is no evidence supporting plaintiff's unjust enrichment claim, nor is there any basis for liability under the Computer Fraud Act, as there is no evidence that corporate defendants directed defendant Dunlap to copy any information from his Calence computer.

1 Plaintiff has moved for summary judgment against corporate defendants only with respect
2 to the liability components of its claims for conspiracy/aiding and abetting breaches of fiduciary
3 duty and tortious interference claims. Plaintiff first argues that corporate defendants are liable
4 as a matter of law for aiding and abetting defendant Falk's breaches of his fiduciary duty.
5 Plaintiff next argues that corporate defendants are liable as a matter of law for tortious
6 interference with business relations by causing defendant Falk to breach his duty of loyalty, and
7 by using improper means to solicit Calence employees.

8 For the reasons set forth below, the Court DENIES plaintiff's motion for summary
9 judgment and GRANTS IN PART defendants' motion for summary judgment.

10 **II. DISCUSSION**

11 **A. Background**

12 The Court has set forth the background of this action in its previous Orders, and will not
13 repeat it here. Facts specifically relevant to the instant defendants will be discussed in context
14 below. This Order addresses arguments pertaining only to corporate defendants, Mark Zerbe
15 and Dimension Data.

16 **B. Motions to Strike**

17 To the extent that plaintiff raises the same motions to strike with respect to corporate
18 defendants as it raised with respect to the individually named defendants, the decisions made on
19 those motions to strike, as set forth in the Court's Order on defendant Dunlap's motion for
20 summary judgment, apply with equal force to the instant motion, and they will not be repeated
21 here. (*See* Dkt. #319). Further, the Court DENIES plaintiff's motion to strike defendants' brief
22 on the basis that it was written in 11-point font versus 12-point font. The Court finds that
23 motion without merit.

24 The Court also declines to consider any declarations or other evidence submitted after the
25 close of briefing on the instant motions for summary judgment, including Dkts. #275 - 281.
26 None of the parties sought permission from this Court to file briefing related to the motions for

1 summary judgment outside of the Court's normal briefing schedule as set forth in the Local
2 Rules.

3 Finally, the Court DENIES defendants' motions to strike as moot. The Court makes the
4 following determinations on an analysis of the evidence presented other than that disputed by
5 defendants in their motions to strike.

6 **C. Standard of Review for Summary Judgment**

7 Summary judgment is proper where "the pleadings, depositions, answers to
8 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
9 genuine issue as to any material fact and that the moving party is entitled to judgment as a
10 matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247
11 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See*
12 *F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*,
13 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a
14 genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or
15 the bald assertion that a genuine issue of material fact exists, no longer precludes the use of
16 summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics,*
17 *Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

18 Genuine factual issues are those for which the evidence is such that "a reasonable jury
19 could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. Material facts
20 are those which might affect the outcome of the suit under governing law. *See id.* In ruling on
21 summary judgment, a court does not weigh evidence to determine the truth of the matter, but
22 "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d
23 547, 549 (9th Cir. 1994) (citing *O'Melveny & Meyers*, 969 F.2d at 747). Furthermore,
24 conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat
25 summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 60 F. 3d 337, 345
26 (9th Cir. 1995). Similarly, hearsay evidence may not be considered in deciding whether material

facts are at issue in summary judgment motions. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F. 2d 665, 667 (9th Cir. 1980).

D. Tortious Interference

In its Amended Complaint, plaintiff first alleges that corporate defendants: (1) knowingly and intentionally acted to interfere with and misappropriate Calence's contractual relationships with the customers of its Seattle office; (2) knowingly and intentionally acted to induce the breach of the individually-named defendants' employment contracts with Calence; (3) knowingly and intentionally acted to induce the breaches of Calence's employment contracts with each of the Terminating Employees; (4) knowingly and intentionally acted to induce breaches of fiduciary duty by the individually-named defendants; and (5) knowingly and intentionally acted to induce breaches of fiduciary duty and other contractual duties by the Terminating Employees. (Dkt. #127 at 19-20).

In *Pleas v. Seattle*, 112 Wn.2d 794 (1989), the Washington Supreme Court adopted the Oregon Supreme Court's approach to tortious interference claims, holding that:

a cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships. A claim for tortious interference is established when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. . . . No question of privilege arises unless the interference would be wrongful but for the privilege Even a recognized privilege [however] may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege.

Interference can be "wrongful" by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession. Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a "duty of non-interference; *i.e.*, that he interfered for an improper purpose . . . or . . . used improper means . . .".

Pleas, 112 Wn.2d at 803-04 (citations omitted).

As an initial matter, the Court agrees with defendants that plaintiff has failed to allege

1 tortious interference with a business expectancy. The reasoning for that determination is fully
2 explained in the Court's previous Orders on summary judgment, and incorporated by reference
3 herein. Further, the Court agrees with defendants that plaintiff's claim must be dismissed to the
4 extent that it alleges inducement of breaching fiduciary duties. This Court finds no Washington
5 authority recognizing such a claim. Finally, the Court also finds no basis for the allegation that
6 corporate defendants have tortiously interfered with customer contracts. Plaintiff has produced
7 no evidence that it had any ongoing customer contracts with which corporate defendants
8 interfered. Accordingly, the Court focuses only on allegations that defendants interfered with
9 plaintiff's employee contractual relationships.

10 In that regard, the Court finds that there are genuine issues of material fact as to whether
11 defendants interfered with the contractual relationships between plaintiff and the individually-
12 named co-defendants and between plaintiff and the other former employees. Plaintiff has
13 produced evidence that defendant Mark Zerbe had conversations with co-defendants Jon Abb
14 and Thomas Falk asking them to recruit fellow employees, the timing of that recruitment, and
15 appropriate compensation for other employees. Plaintiff has also provided evidence that
16 defendants convinced Thomas Falk to assist with planning the targeted recruiting event, and
17 with helping to organize an en masse employee departure. While defendants argue with the
18 characterization of that evidence, it is up to the trier of fact to assess the credibility of the
19 witnesses and determine what actually happened in each alleged instance. The Court recognizes
20 that corporate defendants have also introduced numerous pieces of evidence raising issues of
21 material fact as to the nature and purpose of the meetings and conversations between defendants
22 Abb, Falk and Zerbe. Accordingly, the Court finds that summary judgment in favor of either
23 party on this claim is not appropriate.

24 **E. Misappropriation of Trade Secrets**

25 Plaintiff next alleges that corporate defendants have misappropriated, and continue to
26 intentionally misappropriate, its trade secrets, in violation of the Washington Uniform Trade

1 Secrets Act (“UTSA”), RCW 19.108, *et seq.* (Dkt. #127 at 20).

2 As an initial matter, the Court notes that there is a question of fact as to whether any trade
3 secrets were actually retained by any of the individual defendants, or other employees, in this
4 action, or whether any trade secrets were divulged to corporate defendants. As plaintiff itself
5 acknowledges, whether a particular piece of information is a trade secret, is a question of fact
6 for the jury. *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 436 (1999). That reason
7 alone is enough to deny summary judgment. Indeed, should a jury determine that no trade
8 secrets were retained or divulged, the claim against defendants necessarily fails.

9 However, even presuming that defendant did possess plaintiff’s trade secrets, this Court
10 has already determined that there is no evidence of misappropriation with respect to Mr. Falk’s
11 notebooks or Mr. Dunlap’s computer disks. Under the UTSA, a misappropriation is defined as
12 the:

13 (a) Acquisition of a trade secret of another by a person who knows or has
14 reason to know that the trade secret was acquired by improper means; or

15 (b) Disclosure or use of a trade secret of another without express or implied
16 consent by a person who:

17 (i) Used improper means to acquire knowledge of the trade secret; or

18 (ii) At the time of disclosure or use, knew or had reason to know that his
19 or her knowledge of the trade secret was (A) derived from or through a
20 person who had utilized improper means to acquire it, (B) acquired under
21 circumstances giving rise to a duty to maintain its secrecy or limit its use, or
22 (C) derived from or through a person who owed a duty to the person seeking
23 relief to maintain its secrecy or limit its use; or

24 (iii) Before a material change of his or her position, knew or had reason
25 to know that it was a trade secret and that knowledge of it had been acquired
26 by accident or mistake.

RCW 19.108.010(2); *McLeod v. Northwest Alloys, Inc.*, 90 Wn. App. 30, 35-36 (1998).

27 There is no evidence that corporate defendants disclosed any of the information in the
28 notebooks or on the disks to third parties. There is no evidence that copies of the notebooks or
29 disks were ever made, and there is no evidence that corporate defendants misused the

1 information contained therein. Accordingly, the Court believes that summary judgment in favor
2 of corporate defendants on this claim is appropriate in part.

3 With respect to the information allegedly divulged to Mark Zerbe, assuming the trier of
4 fact determines that trade secrets were divulged, and with respect to the information contained
5 on Mr. Abb's Blackberry device, there are genuine issues of material fact as to whether such
6 information was misappropriated as defined under the statute. Accordingly, summary judgment
7 in favor of either party is not appropriate on those portions of the claim.

8 **F. Unfair Competition**

9 By essentially reiterating its arguments with respect to tortious interference and
10 misappropriation of trade secrets, plaintiff next alleges that defendants' actions constitute unfair
11 trade practices under RCW 19.86.020 and .030 and under the common law. (Dkt. #127 at 21).
12 For the reasons set forth above with respect to the tortious interference and UTSA claims, the
13 Court finds that summary judgment on the unfair competition claim is also not appropriate.

14 **G. Civil Conspiracy**

15 Plaintiff next alleges that corporate defendants "conspired among themselves and with
16 others to, among other things, interfere with Calence's relationships with its customers, interfere
17 with Calence's contractual relationships with its employees, induce breaches of fiduciary duty by
18 Calence employees, and misappropriate Calence's trade secrets." (Dkt. #127 at 21).

19 To establish a civil conspiracy, [plaintiff] must prove by clear, cogent, and
20 convincing evidence that (1) two or more people combined to accomplish an
21 unlawful purpose, or combined to accomplish a lawful purpose by unlawful
22 means; and (2) the conspirators entered into an agreement to accomplish the
23 conspiracy. "Mere suspicion or commonality of interests is insufficient to
24 prove a conspiracy." "[When] the facts and circumstances relied upon to
25 establish a conspiracy are as consistent with a lawful or honest purpose as
26 with an unlawful undertaking, they are insufficient."

All Star Gas, Inc. v. Bechard, 100 Wn. App. 732, 740 (2000) (citations omitted).

The Court has already found that plaintiff raised genuine issues of material fact with
respect to its civil conspiracy claim against defendant Falk. That determination was made on a

1 review of certain evidence also pertaining to Mark Zerbe. Accordingly, for the same reasons,
2 the Court finds that summary judgment in favor of corporate defendants on this claim is not
3 appropriate.

4 **H. Conversion and Replevin**

5 Plaintiff next alleges that corporate defendants have “appropriated Calence’s confidential
6 information without Calence’s knowledge and consent, and without legal justification” and that
7 defendant is “using and will use this information to harm Calence and benefit Defendants.”
8 (Dkt. #127 at 23). Plaintiff apparently bases its claim against corporate defendants on the
9 materials retained by the individually-named defendants. This Court has already dismissed all of
10 the conversion and replevin claims alleged against the other defendants. Accordingly, the Court
11 finds no basis for the claim against the corporate defendants, and finds that summary judgment
12 in favor of corporate defendants is also appropriate.

13 **I. Unjust Enrichment**

14 Plaintiff next alleges that defendants’ “actions have unjustly enriched Dimension, Falk,
15 Abb and Dunlap at the expense of Calence.” (Dkt. #127 at 23). “Unjust enrichment occurs
16 when one retains money or benefits which in justice and equity belong to another. The doctrine
17 also applies to retention of property or benefits.” *Bailie Communications v. Trend Business*
18 *Sys.*, 61 Wn. App. 151, 160 (1991). This Court has already dismissed all of the unjust
19 enrichment claims alleged against the other defendants. Accordingly, the Court finds no basis
20 for the claim against the corporate defendants, and finds that summary judgment in their favor is
21 appropriate.

22 **J. Computer Fraud and Abuse Act**

23 Finally, plaintiff alleges that corporate defendants violated the Computer Fraud and Abuse
24 Act (“CFAA”). (Dkt. #127 at 23-24). There is no allegation that corporate defendants
25 improperly accessed computerized information themselves. Rather, plaintiff argues that
26 corporate defendants are liable for defendants Dunlap and Abb’s actions. Even assuming that

1 Mr. Dunlap or Mr. Abb violated the CFAA, plaintiff points to no evidence in the record that
2 corporate defendants directed either of those individuals to take any of the alleged improper
3 actions. Accordingly, the Court finds no basis for the CFAA claim, and agrees that summary
4 judgment in favor of corporate defendants on this claim is appropriate.

5 **III. CONCLUSION**

6 Having considered plaintiff's and defendants' motions for summary judgment, the briefs
7 and evidence in support and opposition of those motions, and the remainder of the record, the
8 Court hereby ORDERS:

9 (1) Corporate Defendant's Motion for Summary Judgment (Dkt. #193) is GRANTED IN
10 PART. For the reasons set forth above, the Court hereby DISMISSES plaintiff's claims for
11 conversion and replevin, unjust enrichment, and violations of the Computer Fraud and Abuse
12 Act against corporate defendants. The Court DISMISSES IN PART the tortious interference
13 and misappropriation of trade secrets claims against corporate defendants. All other claims
14 against corporate defendants remain pending for resolution at trial.

15 (2) Plaintiff's Motion for Partial Summary Judgment with respect to corporate defendants
16 (Dkt. #214) is DENIED for the reasons discussed above.

17 (3) The Clerk SHALL direct a copy of this Order to all counsel of record.

18 DATED this 24th day of May, 2007.

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20 RICARDO S. MARTINEZ
21 UNITED STATES DISTRICT JUDGE
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